

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1356

75-1356
To be argued
By Michael Ira Asen

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee

Docket no. 77-1356

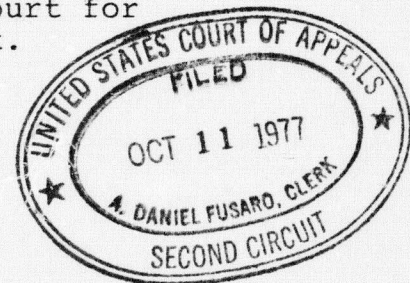
-against-

HERIBERTO C. HERNANDEZ,

Appellant.
-----X

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BRIEF FOR APPELLANT
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On Appeal from a Judgment of Conviction
of the United States District Court for
the Eastern District of New York.



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TABLE OF CONTENTS

	page
Table of Cases.....	1
Questions Presented.....	3
Statement Pursuant to Rule 28(a)(3).....	3
Preliminary Statement.....	3
Statement of Facts.....	4
Argument.....	8
Conclusion.....	19

TABLE OF CASES

	pages
<u>Cady v. Dombrowski</u> , 413 U.S.433, 93S.Ct. 2523, 37L.Ed2d 706 (1973).....	11
<u>Chimel v. California</u> , 395 U.S.752, 89S.Ct. 2034, 23L.Ed.2d 685 (1969).....	11
<u>Schneckloth v. Bustamonte</u> , 412 U.S.218, 93S.Ct. 2041 (1973).....	17
<u>Wong Sun v. United States</u> , 371 U.S.471 (1963).....	19
<u>United States v. Albarado</u> , 495 F.2d799 (2d Cir. 1974).....	9, 11, 15
<u>United States v. Bell</u> , 464F.2d 667(2d Cir.); <u>cert. den.</u> , 409U.S. 991(1972).....	9, 12, 13, 15
<u>United States v. Clark</u> , 475 F.2d240 (2d Cir. 1973).....	9
<u>United States v. Clark</u> , 498 F.2d535 (2d Cir. 1974).....	9, 12
<u>United States v. Davis</u> , 482 F.2d893 (9th Cir. 1973).....	11
<u>United States v. Doran</u> , 482 F.2d929 (9th Cir. 1973).....	12
<u>United States v. Edwards</u> , 498 F.2d496 (2nd Cir. 1974).....	9, 10, 14, 15, 17, 18
<u>United States v. Epperson</u> , 454 F.2d769 (4th Cir.); <u>cert. den.</u> 406U.S. 947(1972)....	10, 16
<u>United States v. Kroll</u> , 481 F.2d384 (8th Cir. 1973).....	12
<u>United States v. Legato</u> , 480 F.2d408 (5th Cir. 1973).....	12
<u>United States v. Lindsey</u> , 451 F.2d701 (3rd Cir. 1971).....	12
<u>United States v. Lopez</u> , 328F.Supp. 1077 (E.D.N.Y. 1971).....	17

<u>United States v. Meulener</u> , 351 F.Supp. 1284 (D.C. Calif., 1972).....	14, 17
<u>United States v. Mitchell</u> , 352 F. Supp. 38 (E.D.N.Y.); <u>aff'd.</u> , 486F.2d 1397(1973)....	12
<u>United States v. Riggs</u> , 474 F.2d699 (2nd Cir. 1973).....	9, 10, 16, 17
<u>United States v. Skipworth</u> , 482 F.2d 1272 (5th Cir. 1973).....	11, 12, 16
<u>United States v. Williams</u> , 516F.2d 11 (2d Cir. 1975).....	17, 18

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BRIEF FOR APPELLANT

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for the Eastern District of New York.

QUESTION PRESENTED

Whether the search of appellant's wife's pocketbook and
seizure of the contraband were in violation of the Fourth Amend-
ment.

PRELIMINARY STATEMENT

This is an appeal from a Judgment of the United States District
Court for the Eastern District of New York (the Honorable John R.
Bartels) rendered on August 15, 1973 convicting the appellant (and
his wife) of unlawfully possessing narcotics with intent to
distribute them.

The appellant was sentenced on July 18, 1977 (after a voluntary
surrender ending a four year fugitive status) to three (3) years
special parole.

STATEMENT OF FACTS

The appellant and his wife were indicted for the crime of Possession of Narcotics with Intent to Distribute. The contraband was discovered pursuant to a search of his wife's pocketbook which occurred after appellant and his wife activated an airport security magnetometer.

On August 14, 1973, a suppression hearing was held. The Government called two (2) witnesses: Walter R. O'Connor and John J. Walsh. The facts elicited were as follows:

On January 13, 1972, the appellant and his wife, their two children and their grandmother were standing at Gate 18, La Guardia Airport, waiting to board flight 429. It was a United Airlines domestic flight from New York City to South Bend, Indiana, with one stop-over. (H.30-31, 135).¹ Appellant's wife was not fluent in English. (H.3, 132).

At approximately 11:15 A.M., on January 13th, John J. Walsh, Deputy United States Marshall, on duty at La Guardia Airport, received a phone call from a United Airlines personnel. He was told that there were two "selectees" at Gate 18 in the process of boarding flight 429. (H. 69-70). He was requested to come to Gate 18 and interview the selectees. He and Deputy Richard McHale responded. (H. 71).

¹. All such references are to the page(s) of the transcript of the suppression hearing.

The term "selectee" was derived from the Federal Aviation Administration profile of potential airline hijackers in order to identify them and prevent them from boarding. (H. 42-43). The airline personnel or United States Marshall could designate a person as a selectee merely because he or she were traveling with a selectee. (H. 34). Once a person was designated as a selectee, and he could not identify himself satisfactorily, he had to submit to a magnetometer test. Unless the magnetometer registered negative (no metal detected), the selectee had to be searched and his carry on bags searched. (H. 46). The selectee could refuse to board if he chose not to produce identification and submit to a magnetometer test or search of his person or property. (H. 48). Anti-hijacking signs² were posted in the various boarding areas. (H. 49).

On January 13th at approximately 1:20 P.M., Deputy Marshall Walsh and McHale arrived at United Airlines Gate 18. Already present and in conversation with appellant was Mr. Mooney, United Airlines ticket agent supervisor. Mooney was not the airline personnel who notified Walsh to interview the "selectees" at Gate 18. (H. 133). Mooney handed the ticket to Walsh, and said that there was a problem with their identification. (H. 75).³

². "The carrying of a concealed weapon aboard an aircraft is a crime and that passengers and baggage are subject to search under Federal Law and FAA Regulations." (H. 49)

³. The ticket was issued to five persons with surname of Rivera - the wife's maiden name. (H. 30, 135).

They stated they had no identification (H. 78). Walsh testified that he was able to verify Mooney's information by what Mooney told him and "with the selectees standing there and the ticket." (H. 82).

Thereafter, Mooney requested that appellant and his wife accompany him to the magnetometer inside Gate 15 (H. 85), about 150 feet away from Gate 18 (H. 84). Walsh and McHale followed them. (H. 86). The grandmother and two children were to remain at Gate 18. (H. 136).

The magnetometer was set up inside a jetway, "a circular area where we can close the door behind us and interview the people." (H. 87). Neither appellant nor his wife were told that if they did not desire to proceed to the magnetometer, they could abandon their flight (H. 123).

Appellant carried no luggage, but his wife carried a pocket-book and flight bag. (H. 90). Both people activated the magnetometer. (H. 89). Walsh told appellant he would pat him down in order to clear him for the flight. "I said, in other words, the only way we could clear him for the flight was to make sure he has nothing on him to go board the plane. (H. 92-92). Appellant said "Okay." (H. 156). He was not told he could refuse. (H. 93, 156).

The pat down of appellant revealed a flexible bulge in appellant's front pocket which felt like "documents or paper." (H. 95). In appellant's right rear pocket, Walsh felt "what appeared to be two cartridges." (H. 95). Walsh asked appellant what he had in the rear pocket, and remove them. Appellant produced two .38 cartridges. (H. 96). Neither appellant or his wife were carrying

a weapon onto the plane.⁴

Then, Walsh asked the wife "if she would mind if I looked into her bags." (H. 98). She said, "Okay", or "Go ahead, here." (H.98).

The first bag he searched was a flight bag which contained the children's clothing. The second bag was her pocketbook. It was opened at the top with a purple jacket folded across. (H. 100). He reached into the pocketbook and felt a solid object. He removed a brown paper bag which was closed. (H. 109). He asked her, "What do you have here? And she says, 'Medicine.'" (H. 111). Then, he looked into the brown paper bag, "and it appeared to me to be heroin and cocaine." (H. 110). At this point, appellant said, "it's cocaine and heroin. It's mine, let my wife go." (H. 111).

Appellant and his wife were arrested, advised of their rights and taken to Gate 31, Eastern Airlines (Walsh's office).⁵

At the conclusion of the suppression hearing, the trial court made the following findings:

"What I am saying is that I believe that the patdown was reasonable under the circumstances and was consented to and it disclosed these cartridges, and also I am saying that from the testimony it seems to me that the examination of Mrs. Hernandez' pocketbook was consented to and it disclosed heroin.

⁴. After appellant was arrested and searched again, \$4,179.95 was seized from his front pocket. (H. 146) And, a later search of the two suitcases revealed two pistols. (H. 116-117).

⁵. They were not questioned.

It seemed to me this justified the arrest of both of them, and, of course, the subsequent search of Mr. Hernandez disclosed \$4,179.95 and the subsequent search of the bags disclosed these weapons. The latter will not be admissible in this case at all." (H. 169)

Thereafter, on August 15, 1973, both the appellant and his wife were placed on trial before a jury. The Government called two witnesses: James J. Walsh and Michael Grimes.

The testimony of Walsh essentially repeated his testimony at the suppression hearing.

The testimony of Grimes, an agent employed by the Drug Enforcement Administration, consisted of establishing the street value of the contraband in evidence.⁶

Both defense attorneys had entered into stipulations with the Government regarding the quantity and quality of the contraband as evidenced by the laboratory reports.

THE SEARCH OF APPELLANT'S WIFE'S POCKET-
BOOK, AND SEIZURE OF CONTRABAND CONTAINED
THEREIN WAS IMPROPER AS A VIOLATION OF THE
FOURTH AMENDMENT.

The contraband in issue was seized from the pocketbook of appellant's wife during a search of her hand luggage. The search occurred after both appellant and his wife activated a magnetometer in the boarding rampway at La Guardia Airport on January 13, 1972.

⁶. None of the contraband was considered by Grimes to be strictly for personal use by either appellant, his wife or both. (T. 268, 271 - reference to Trial testimony).

Both appellant and his wife were arrested. Both moved for suppression of the physical evidence and appellant's admission. After the pre-trial hearing, the trial judge denied the motion. Both defendants went to trial before a jury which resulted in conviction.

As is usual in these airport security search cases, there was no search warrant authorizing the search of either appellant or his wife's carry on luggage.⁷ Moreover, the respective searches were not claimed to be made upon probable cause. Since these searches were particularly conducted pursuant to certain procedures established by the Federal Aviation Administration, their propriety is to be determined by the standards established by this Court in United States v. Bell, 464 F.2d667 (2d Cir.), cert. den., 409 U.S. 991 (1972); United States v. Clark, 475 F.2d240 (2d Cir. 1973); United States v. Clark (Clark II), 498 F.2d 535 (2nd Cir. 1974); United States v. Ruiz-Estrella, 481 F. 2d723 (2d Cir. 1973); United States v. Albarado, 495 F.2d799, (2d Cir., 1974); and, United States v. Edwards, 498 F.2d496 (2nd Cir. 1974).

Based on these cases, a valid airport security search requires proof of a compelling circumstance⁸, proof of a voluntary and

⁷. There was no patdown, frisk or search of the wife's clothing.

⁸. A standard has been established in Bell, supra, wherein Bell "... admitted that he was out on bail facing narcotics and attempted murder charges." at 672.

knowing consent, or proof that the person knew that he or she could refuse to submit to the search by choosing to forego the flight. United States v. Ruiz-Estrella, supra, at 727.

The F.A.A. rules and regulations are intended to guide the airline personnel and Federal Marshals to identify and prevent potential hijackers from boarding flights. The established procedures are designed to assist the Marshals in specifically determining whether a particular individual might be a potential hijacker. However, these procedures can be abused, thereby allowing the Marshal to search for contraband, not weapons or explosives. The Court in United States v. Epperson, 454 F.2d 769,771, cert. den., 406 U.S.947 (4th Cir. 1972) stated:

"The governmental interest which justifies the physical search of the defendant's person or carry-on luggage is to prevent 'armed piracy of a passenger aircraft in flight', and the justification for the search arises from 'the reasonable fear of the marshal for the safety of airline passengers (entitling him), for their protection, to conduct a carefully limited search... in an attempt to discover weapons which might be used for air piracy.'"

This Court has recognized the potential for abuse, as stated in Edwards, supra at 100, by Chief Judge Friendly:

"If experience should demonstrate that the Government is abusing its authority and is using the airport search not for the purpose intended but as a general means for enforcing the criminal laws, a means for limitation

⁹ In Epperson, supra, the court upheld a search which revealed a gun in the jacket that the defendant was carrying, after he failed to satisfactorily explain the high metal indication of the magnetometer and activated the magnetometer a second time after removing several metal objects from his person.

can be found in the suggestion in Judge Aldrich's dissenting opinion in United States v. Skipworth, supra, 482 F.2d (1272) at 1280-1281. See also United States vs. Davis, supra, 482 F.2d (893) at 909-910 and n. 44."

The facts of this case demonstrate such abuse.

The appellant was not alone, he was accompanied by his family. He did not have a ticket in only one name, but rather his ticket included passage for his wife, his two children and their grandmother. Simply because the airline ticket sales person believed that he fit within the profile, did not authorize the airline supervisor and Marshals to treat his wife as a "designee" as well. "The ultimate standard of the Fourth Amendment on which we must base our opinion, therefore, is one of reasonableness." Cady v. Dombrowski, 413 U.S.433, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973). And the reasonableness of a search depends upon the facts and circumstances and the total atmosphere of each case. Chimel v. California, 395 U.S.752, 765, 89 S. Ct. 2034, 23 L.Ed. 2d 685 (1969). "Our inquiry here must be directed to the basic issue whether in the totality of circumstances such a search is reasonable." Albarado, supra, at 784. Even in light of the governmental interest to be protected, designating the wife as a selectee and consequently searching her pocketbook was unreasonable and excessive. The hijack profile only contained four factors, none of which permitted the airline personnel or Deputy Marshal Walsh to treat appellant's wife as a selectee. (H. 24). Moreover, it was customary for the airlines to issue one ticket covering a family. (H. 31). Because of this custom, appellant's wife

was designated a selectee for absolutely no reason. Clearly common sense dictates that appellant would not hijack an airplane carrying his own wife and children. Thus, appellant's wife was improperly designated as a selectee and not subjected to a search in good faith.¹⁰

Under Bell, supra, an airport security search is proper when the individual has been properly classified as a selectee, has activated the magnetometer, has no personal identification, and has indicated some suspicious circumstance. In United States v. Mitchell, 352 F. Supp. 38 40 (E.D.N.Y.); Aff'd, 486 F.2d 1397 (1973), the defendant surreptitiously went through the magnetometer before the Marshals approached him.¹¹

¹⁰ The defendant in United States v. Kroll, 481 F. 2d 884, 887 (8th Cir. 1973), met the profile and activated the magnetometer. The marshal was suspicious of the contents of the file section of defendant's attache case. Defendant was compelled to open it, revealing an envelope containing amphetamines. Suppression was granted and affirmed, the Court questioned the good faith of the Marshalls: "If he (the Marshal), in fact, seriously believed that weapons or explosives were in the envelope, it is likely that he would have cleared the area of other persons, or have taken the case and envelope to an area away from the people."

¹¹ In Clark, supra, at 536, the appellant "seemed 'stupefied', like he wasn't himself". Or, in United States v. Lindsey, 451 F. 2d 701, 704 (3rd Cir. 1971), the defendant used four different names as well as extremely anxious behavior. Or, United States v. Skipworth, 482 F.2d 1272, 1277, defendant had a bulging pocket; United States v. Doran, 482 F. 2d 929 (9th Cir. 1973), defendant was under influence of narcotics or alcohol; United States v. Legato, 480 F. 2d 408 (5th Cir. 1973), defendant was suspected due to an anonymous phone tip regarding passenger carrying bomb in orange bag. See also, United States v. Riggs, 474 F. 2d 699 (2d Cir. 1973), Marshals already had probable cause to arrest defendant for narcotics violation.

In this case, appellant was designated a selectee. However, the Government failed to produce a witness such as the ticket agent or other airline personnel, who could testify to the fact that he or she properly fit within the profile guidelines. Deputy Marhsall Walsh merely concluded that appellant was a selectee based upon what he was told, the physical presence of appellant and the ticket. Yet, appellant did not behave abnormally. Walsh observed him accompanied by his family. There was nothing implicitly or overtly suspicious in what Walsh observed. The search of appellant and his wife failed to conform to the Bell criteria in the absence of proof that appellant or wife, in fact, were appropriately designated as a selectee. In Bell, supra, at 668, "The ticket seller, Mr. Ralph Whitfield, who had been employed by Eastern Airlines for eight years, was familiar with an anti-hijacking system..." and thus, at least, familiar with the profile.

There was no testimony in this case that in January, 1972, the search of carry on baggage applied to everyone. Rather, only persons designated as selectees were subject to the magnetometer. (H. 46). Here, because neither appellant nor his wife displayed any identification, they were separated from other passengers and their family, to undergo a magnetometer test. Deputy Marshall Walsh testified that in the back of where appellant and his wife stood (at Gate 18), there was an air piracy sign, about twenty inches by thirty inches in size, and approximately thirty feet away from where they stood. (H. 73-74). The appellant and his wife were taken to the Gate 15 rampway, the location of the magnetometer.

Walter R. O'Connor testified that he could not say from his own knowledge that on January 13, 1972 at the area of Gate 15 an air piracy sign was posted, or posted in the Spanish language. (H. 60).

Neither appellant nor his wife were informed that if they chose not to produce identification and submit to a magnetometer test or search of their person and luggage, they could exercise that option by deciding not to board the flight. The failure to so advise them, rendered the resulting search unreasonable. If they knew of that choice, and elect to forego their flight plans, the reason for the magnetometer and consequent search is eliminated. As the Court in United States v. Meulener, 351 F. Supp. 1284 (C.D. Calif. 1972) stated:

"...(T)he governmental interest which justifies a physical search of the person or hand luggage of a prospective passenger in the process of boarding an airliner is lacking in the case in which the prospective passenger declines to board the plane. To meet Fourth Amendment guarantees, the prospective passenger must be advised that he has to submit to a search if he wants to board the plane, but that he can decline to be searched if he chooses not to board the aircraft." at 1289.

There is no evidence to indicate that either appellant or his wife were aware of the contents of the air piracy signs or that there was any public address announcement to the same effect. Moreover, appellant's wife was not fluent in English, and thus would not have understood any warning without interpretation. In Edwards, supra at 499, there was proof that an Eastern Airlines employee announced over a loudspeaker "...that all carry-on luggage would be searched."

Insofar as the issue of the reasonableness of the search is concerned, at least the defendant in Edwards was unmistakeably

put on notice. In this respect, Edwards is clearly distinguishable. Neither appellant or his wife were in a position to avoid the subsequent searches. Thus, the standard enunciated by Judge Friendly in his concurring opinion in Bell, and later reiterated in Edwards has not been met.¹² While this Court "... has indeed demonstrated in its confrontations with the problem (legality of these searches) that it has no unanimous point of view," (Albarado, supra, at 803), the question of prior notice to search is considered a factor affecting the reasonableness of the search, not affecting consent.¹³

The trial court denied suppression by finding that both appellant and his wife consented to their respective searches. The searches were conducted in the sealed off area of the magnetometer, in the presence of Deputy Marshal Walsh and McHale. Both appellant and his wife had activated the magnetometer. Again, no notice was given to them regarding their right to refuse a search. Deputy Marshal Walsh told appellant, "...the only way we could clear (him) for the flight was to make sure he has nothing

12. "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air." Edwards, supra at 500.

13. "Judge Friendly says that prior notice of 'fair warning' goes to 'reasonableness'. He does not claim that consent is implied by proceeding through the airport search when warned of its existence. In United States v. Albarado, 495 F.2d799, 806-807(2d Cir.1974), this Court held that if air travel were conditioned on submission to a search, the potential air traveler's submission would be the product of coercion and hence would not constitute implied consent." Edwards, supra, at 501, n.1, (Oakes, J., concurring).

on him to go board the plane.: (H. 93). Appellant acceded to the frisk and two .38 cartridges were removed by him and given to Walsh. At that moment, Walsh should have asked appellant (or his wife) whether either of them were carrying a weapon. However, he then asked the wife if she would "mind" if he searched her bags. Clearly, both appellant and his wife reasonably believed that Walsh was simply interested in satisfying himself that she carried no weapon. She complied. She was not asked to walk through the magnetometer without her bags or to produce any metal either on her person or in her bags. The failure to make such a request, like the failure to warn her of her right not to be searched, undermines the reasonableness of the subsequent search. Epperson, supra.

Likewise, although the brown paper bag "...felt like a solid hard object." (H. 109), she gave a reasonable explanation for it. Walsh did not subject the brown paper bag to a magnetometer test. Moreover, there is no evidence that he believed that it contained a weapon.¹⁴ Under the circumstances, the search of the brown paper bag was not reasonable.

The circumstances of the search here are strikingly similar to the facts in Ruiz-Estrella, supra, at 727-728,

"True, Ruiz-Estrella did hand over the bag to the sky marshall; it was not wrenched from his hands against his will. But this conduct, while admittedly relevant, will not suffice to meet the government's burden in

¹⁴. In Skipworth, supra, at 1274, the Court indicated that at the suppression hearing, "Rodriguez (United States Marshall) testified that he 'was inclined to believe that he (Skipworth) had a gun in his pocket.'"

this case. Whether we adopt the theory that appellant was told 'he would have to go through a baggage search' (as La Sota stated on direct), or that he was 'asked' to submit to such a search (as was testified on cross), is of little moment. The 'request' took place after the agent, attired in a uniform and badge, took Ruiz-Estrella away from the boarding area, into a stairwell, and closed the door behind them. The fact that a suspect, who has not been warned of his right to refuse the search, silently hands over his bag in such circumstances will not support the inference of freely given consent."

Here, appellant and his wife were separated from their family, an inherently coercive circumstance. It is reasonable to believe that under "the totality of all the surrounding circumstances," (Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973)), both appellant and his wife simply acquiesced to whatever instruction came from Walsh and McHale. Moreover, the mere existence of an anti-hijacking poster does not satisfy the Government's "...burden of proving that the consent was, in fact, freely and voluntarily given." Id., at 222. (Ruiz-Estrella, supra, at 728 n.4, citing Meulener, supra at 1288, and Lopez, supra, at 1092).

The contraband was not concealed within the purple garment folded across the wife's pocketbook, as in Edwards, supra, at 499. The defendant in Edwards, like appellant's wife, carried her pocketbook as well as a "beach bag". And the seizure in Edwards was from the "beach bag". Judge Oakes' rationale in Edwards, followed in United States v. Williams, 516 F.2d 11, 12 (2d Cir., 1975), is to the effect that "...there was implied consent to search the carry on baggage by virtue of the fact that baggage which one does not want to have searched may be consigned to the luggage

compartment."

Clearly, appellant's wife did not expressly consent to the search. Moreover, she did not impliedly consent. Under Judge Oakes' reasoning, "If, however, appellant did not know she could avoid the search by checking her bag, she would not know she could withhold her consent to a baggage search and still fly. Her consent, therefore, would not be knowing. "Edwards, supra at 504. In Edwards, even if the defendant had not read an anti-hijacking poster, she surely was put on notice by the public address announcement. Additionally, the carry on baggage before the Court in Edwards and Williams was the "beach bag" or flight bag variety.

Here, the contraband was seized from the wife's pocketbook. It is not the type of carry on luggage which this Court dealt with in Edwards, and should not be classified in the same category as a flight bag or other less personal item.

In the absence of proof of compelling circumstances, or a voluntary consent, and proof that appellant and his wife were aware they had the right to refuse a search or avoid a search of her bags by checking them in the baggage compartment, the searches in this case were improper. Consequently, the narcotics which were seized from appellant's wife's pocketbook and the two cartridges should have been suppressed, and it was error to admit them into evidence. As such, appellant's conviction should be reversed.

APPELLANT'S ADMISSION MUST BE SUPPRESSED
AS A FRUIT OF THE ILLEGAL SEARCH.

Appellant admitted that the contents of the brown paper bag were narcotics, and that they were his. His statement was a direct result of the improper intrusion by Walsh into the bag. As such, it should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9L.Ed.2d 441 (1963):

"Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

Here, the connection between the improper search and appellant's admission is immediate. There was no intervening event to attenuate the taint.

CONCLUSION

FOR THE ABOVE MENTIONED REASONS, THE
JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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Dated: October 3, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

Docket No. 77-1356

-against-

HERIBERTO C. HERNANDEZ,

Appellant.
-----X

STATE OF NEW YORK)

COUNTY OF NEW YORK)SS.:

MICHAEL IRA ASEN, duly sworn, deposes and says:

1. That I am not a party to the action and am over 18 years of age.
2. I reside in the City and State of New York.
3. On October 10, 1977, I served the within Brief and Appendix upon the following at the address designated by said parties for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Clerk, United States Court of Appeals
For the Second Circuit
United States Courthouse
Foley Square, New York 10007

David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Michael Ira Asen

*Sworn to before me on
October 19, 1977*

LYNN A. MOSER
COMMISSIONER OF DEEDS
City of New York, No. 4-1800
Commission Expires Dec. 1, 1978
John A. Moser